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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 338

HUGH ERBIE BROOKS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 10-13) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1962. A petition for a rehearing was denied on July 16, 1962. The petition for a writ of certiorari was filed on August 15, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an affidavit for a search warrant was invalid because a material part of its allegations appeared on sheets attached to the one-page printed form.

2. Whether the trial court abused its discretion in its rulings concerning the sequestration of witnesses.

RULE INVOLVED

Rule 41(c), F.R. Crim. P., provides in pertinent part:

> A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant.

STATEMENT

Petitioners were charged in a two-count information in the United States District Court for the Middle District of Tennessee with failing to register and to pay an occupational tax for wagering, in violation of 26 U.S.C. 4401, 4411, 7203, and 7262 (R. 9a-11a). The evidence both on the merits and on petitioners' motion to suppress evidence was heard by the court, which found all the petitioners guilty on both counts. Petitioner Brooks was sentenced to imprisonment for nine months and a $1,000 fine, while the other petitioners were sentenced to imprisonment for six months and a $1,000 fine (R. 38a-39a). The court of appeals affirmed (Pet. 10-13).

1. The affidavit for a search warrant was on a one-sheet printed form. It stated (R. 15a):

The undersigned, being duly sworn, deposes and says:

That he (has reason to believe) that (on the premises known as) a concrete block and wood dwelling-type structure with a flat roof, located as follows:

(Continued on Attachment No. 1)

Attachment No. 1 consisted of an additional sheet, having detailed directions on how to reach the building described (R. 16a-17a). The matter on the printed form continued (R. 15a):

in the Middle Judicial District of Tennessee there is now being concealed certain property, namely, records, lottery tickets, adding machines and other wagering paraphernalia, which are being used to conduct a numbers

(here describe property)

lottery without the person engaged in the activity having

(here give alleged grounds for search and seizure)

registered with the District Director of Internal Revenue and paid the special occupational tax imposed on such persons. The above being in violation of Sections 4411; 4412 and 7203, Internal Revenue Code of 1954.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

(Continued on Attachment No. 2)

Attachment No. 2 consisted of three additional sheets containing the statement of John B. Anderson, Jr.,

an Internal Revenue agent, of his reasons for believing that a gambling operation was being conducted on the aforesaid premises. Each of these sheets was signed "John B. Anderson, Jr. 9-26-60" (R. 17a-19a). The matter on the printed form concluded (R. 16a):

> JOHN B. ANDERSON, JR.,
> (Signature of Agent)
> Special Agent, Intelligence Division,
> Internal Revenue Service
> (Official Title, if Any)
>
> J. WASHINGTON MOORE,
> United States Commissioner.
>
> Sworn to before me and subscribed in my presence September 26, 1960.

Agent Anderson testified that the additional sheets were attached to the form copy at the time he swore to it (R. 1b). After the Commissioner had read the entire document, Anderson raised his right hand and said, "I swear that the information contained in this document is true to the best of my knowledge and belief" (R. 2b).

2. At the opening of the trial the following took place (R. 44a-45a):

> Mr. Lillard [counsel for petitioners]: May it please the Court, I would like to ask the rule on all the witnesses except the ones selected by the Government to remain.

After the first witness was called the court said, "The witnesses will retire to the witness room" (R. 45a).

Agent Anderson testified in detail as to the execu-

tion of the search warrant (R. 45a-52a). He was asked on cross examination (R. 49a):

> Q. Did you ask anybody to let you in?
>
> A. The first person who arrived announced that we were federal officers with a search warrant.
>
> Q. Now, who was that person?
>
> A. I don't know whether Special Agent Lowry was first or not, but that was the first thing we did.

At the conclusion of Anderson's testimony, the United States Attorney asked leave to call agent Lowry, who had been in the courtroom, to testify about one act. Petitioner's counsel stated that he would object, and that he would move "to disqualify all of the Government witnesses who are under the rule, and exclude their testimony from this record for the reason that Mr. Lowry has been present in this courtroom during the hearing thus far, and immediately after this court went into recess, Mr. Lowry went to the witness room where the other witnesses are" (R. 51a-52a).

Lowry explained that, during the recess, he had gone to the witness room and had commented, he believed to Mr. Smith, that petitioners' counsel had asked Anderson several times who shouted at the back door of the raided premises and who was the first to go in the back door. Lowry was asked if he knew who had shouted at the back door. He started to answer but, on defense objection that he had been present in the court room, his answer was excluded (R. 53a-54a; see also R. 54a-55a). The court over-

ruled the motion to disqualify the other government witnesses (R. 54a). The testimony of James Hayes was also excluded because, unknown to government counsel, he had been in the courtroom (R. 57a).

Agent Cummings testified that he announced at the front door that the persons at the door were federal agents with a warrant (R. 56a) and agent Fuhrman testified that he and another agent made the announcement at the side door (R. 59a-60a). Fuhrman testified on cross-examination that when Lowry came into the witness room Fuhrman was talking to a Miss Kenyon; while he overheard Lowry tell Smith that Anderson was being cross-examined, he did not hear anything else (R. 60a-61a).

Petitioners Brooks and Bridgeforth, testifying in their own behalf, stated that they did not hear anybody shout that they were officers with a search warrant before the officers broke into the premises (R. 62a-65a).

ARGUMENT

1. The affidavit for a search warrant was valid. Attached to the printed form consisting of one sheet, which was properly executed, were additional sheets on which appeared the description of the premises to be searched (Attachment 1) and the facts showing probable cause to believe that a felony was being committed on the premises (Attachment 2).[1] These

[1] No contention is made in this Court that the grounds stated were insufficient to constitute probable cause.

attachments were added because it was physically impossible to get all the details within the limits of the printed form. Each page of the attachments was signed by the agent swearing to the affidavit. The testimony showed that the instrument as a whole had been read by the commissioner and had been sworn to by the officer (R. 2b). Even if there had been a defect in the form or placement of the jurat, this would have been inconsequential in light of the uncontradicted testimony that the affidavit was properly sworn to. *United States* v. *Galato*, 171 F. Supp. 169, 170 (M.D. Pa.); see *Blackburn* v. *Commonwealth*, 202 Ky. 751, 261 S.W. 277; *Pottsville* v. *Curry*, 32 Pa. 443; *Order of Aztecs* v. *Noble*, 174 S.W. 623 (Tex. Civ. App.); *Hanson* v. *Cochran*, 14 Del. 184, 31 Atl. 880, 881.

2. The trial court was more than fair toward petitioners in its rulings with regard to the sequestration of witnesses. This is a matter which is left largely to the discretion of the trial court. The guiding lines were laid down by the Court in *Holder* v. *United States*, 150 U.S. 91, 92, a capital case:

> Upon the motion or suggestion of either party, such a direction as that in question is usually given. If a witness disobeys the order of withdrawal, while he may be proceeded against for contempt and his testimony is open to comment to the jury by reason of his conduct, he is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground merely, although the right to exclude under particular circumstances may be supported as within the sound discretion of the trial court.

Similarly, it was recently held in *United States* v. *Schaeffer*, 299 F. 2d 625, 631 (C.A. 7), construing *Holder*, that defense witnesses who violated the court's instruction to remain outside the courtroom should not be barred from testifying, in the absence of circumstances indicating the connivance or consent of the defendant or his counsel.

In the present case two government witnesses were not allowed to testify, although their presence in the courtroom seems to have been innocent. Under the decisions in *Holder* and *Schaeffer*, the district court was not even required to exclude their testimony. *A fortiori*, there was no requirement that the district court exclude the testimony of other witnesses merely because a statement made in the witness room described a small portion of the trial proceedings—the statement by agent Lowry that petitioners' counsel had cross-examined a witness as to which agent had shouted at the back door of the raided premises and which had entered first. This is particularly true since there had been no instruction either requested or given that the witnesses refrain from conversing about the facts with persons other than counsel.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1962.